IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1949

No. 501

TAX COMMISSION OF THE STATE OF WASHINGTON,
E. C. HUNTLEY, E. W. ANDERSON and T. S. HEDGES,
Petitioners,

v.

WEYERHAEUSER SALES COMPANY.

BRIEF OF PETITIONERS IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SMITH TROY,
Attorney General of the State of Washington,

C. JOHN NEWLANDS,
Assistant Attorney General of the State of Washington,

Counsel for Petitioners.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

INDEX

Page

Preliminary Statement 3

Argument

I. Further Analysis of the Business and Occupation Tax..... 5

II. There Is No Discrimination..... 10

III. The Business and Occupation Tax Is an Excise Tax..... 14

Conclusion 15

TABLE OF AUTHORITIES CITED

CASES

Adams Mfg. Co. v. Storen, 304 U. S. 307.....4, 8, 9, 11, 12

Allied Mills v. Dept. of Treasury, 318 U. S. 740.....4, 8, 12

American Mfg. Co. v. St. Louis, 250 U. S. 459.....8, 9, 12

Columbia Steel Co. v. State of Washington, 30 Wn. (2d) 658..... 4

Freeman v. Hewitt, 329 U. S. 249.....4, 8, 9, 11, 12, 13

International Harvester Co. v. Dept. of Treasury, 322 U. S. 340.....4, 8, 11, 12, 14

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33..... 11

WASHINGTON STATUTES

Washington Laws of 1935, Chapter 180, as Amended..... 5
(Revenue Act of 1935)

§ 4 .....5, 6, 7, 11, 12, 14

§ 5 .....6, 7

§ 6 .....6, 7, 8

§ 7 .....11, 14

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1949

No. 501

TAX COMMISSION OF THE STATE OF WASHINGTON, E. C. HUNTLEY, E. W. ANDERSON and T. S. HEDGES,
Petitioners,

v.

WEYERHAEUSER SALES COMPANY.

BRIEF OF PETITIONERS IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This action presents the question of whether the Washington Business and Occupation tax as imposed upon respondent is repugnant to the Commerce Clause of the United States Constitution. The issue is, ad-

mittedly, the same as that in *Allied Mills, Inc. v. Department of Treasury*, 318 U. S. 740, and *International Harvester Co. v. Department of Treasury*, 322 U. S. 340. Involved is the imposition of a gross receipts tax upon those engaged in business in Washington as measured by the receipts from sales wherein the merchandise was delivered in interstate commerce to buyers at points in that State. It is the reverse of the situation involved in *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Freeman v. Hewit*, 329 U. S. 249.

Upon the first appeal of this action to the Supreme Court of Washington, that question was not considered. See dissenting opinion in companion *Columbia Steel Co.* case, Appendix B to petition, pp. 45-46. Rather, the Supreme Court below ruled that the Business and Occupation Tax was so framed as to *discriminate* against interstate commerce.

Both of the above points have been discussed in petitioners' Brief in Support of Petition for Writ of Certiorari, the first point at pages 24 to 29, and the second point at pages 14 to 24. However, certain of respondent's statements in his answering brief regarding the discrimination point require a short statement in reply. The attempt will be made only to explain and to analyze the Business and Occupation Tax statute itself, it being petitioners' belief that an understanding thereof will make it clear that there is in fact no discrimination in its imposition upon respondent. In so doing, an attempt will be made merely to supplement materials already covered in petitioners' supporting brief.

I.

FURTHER ANALYSIS OF THE BUSINESS AND OCCUPATION TAX

The Business and Occupation Tax is measured by the gross receipts or gross income of persons engaged in business in the State of Washington, and is so framed that the same receipt can be included in the measure of the tax only once.

An examination of the Revenue Act of 1935 (Chapter 180, Washington Laws of 1935), as amended at each biennial session of the Legislature since 1935, will demonstrate that the taxes imposed upon the gross receipts of those engaged in business are mutually exclusive, so that no business is subjected to more than one tax upon its gross receipts. The Business and Occupation Tax, with which we are here involved, is a gross receipts tax applicable to substantially all persons engaged in business in the State except those subjected to a special tax dealing with a specific business activity, such as, for example, a public utility. Provisions of the Business and Occupation Tax have been set forth in Appendix A of the petition.

Examination of the first sentence of § 4 will demonstate that the tax is imposed upon persons engaged in business for the privilege of engaging in business in Washington. The remainder of that section classifies all business activities into categories, such categories being for the purpose of setting out the rate and measure of the tax to be imposed upon those engaged in various types of business. It is the obvious intent to accomplish thereby two things: (1) impose varying rates upon different types of business according to the ability to pay, and (2) permit the use of three different technical terms as mea-

sures for the determination of the tax upon the different business activities; these measures, in turn, are adapted to the peculiar aspects of the business function performed.

The Business and Occupation Tax is one single tax composed of various categories into which all business activities are classified, but as to which no business activity will fall into more than one. If the definitions of the business activities found in § 5 do not themselves exclude a certain business from two categories, § 6 serves to resolve the situation by placing the activity into one or another classification for the purpose of imposing this one single tax upon the gross receipts of the business. This is not a statute imposing a wholesaler's tax, a manufacturer's tax, a retailer's tax, a tax on service businesses; it is one tax imposed upon the gross receipts or income of all engaged in business, the rate and measure of which tax is to be determined by fitting the business activity into a single classification.

Section 6 of the Revenue Act provides as follows:

> "Every person engaging in activities which are within the purview of the provisions of two or more of paragraphs (a), (b), (c), (d), (e), (f) and (g) of section 4, shall be taxable under each paragraph applicable to the activities engaged in: *Provided, however,* That persons taxable under paragraphs (a) or (b) of said section shall not be taxable under paragraphs (c) or (e) of said section with respect to making sales at retail or wholesale of products extracted or manufactured within this state by such persons. (§3, Ch. 156, Wash. Laws of 1943.)"

Construing § 4, the imposing section, together with § 6, particularly having in mind the appropriate definitions contained in § 5, immediately establishes the fact that persons who are engaged in different businesses may find themselves falling under more than one classification.

Thus, a person may be operating a grocery store part of his time and be classified for the Business and Occupation Tax under the retailing category (§ 4(c)), and be a barber in his spare time and be classified under the service category (§ 4(g)). This is proper. Part of his tax will be determined under one rate and measure and part under another. However, the proviso states that one who is taxable under the *manufacturing* classification shall not again pay the same tax under the *wholesaling* classification *with respect to the sale of the article manufactured by him.* That is, one who manufactures an article and sells it in Washington would automatically be twice subjected to the same tax on the same business activity were it not for § 6. This is due to the broad definition of a wholesale sale to include all sales not at retail. See § 5(e), Revenue Act. To prevent this, one who has paid the tax measured by the gross proceeds of the sale of the article once (under the manufacturing classification) shall not pay the same tax on the same measure again (under the wholesaling classification).

It is as easy as that! And yet, through lack of analysis the Supreme Court of Washington held that the tax was imposed upon some wholesalers and not upon others!

It may be asked, Why have a manufacturing classification? There are three answers as to why a tax on sales alone would be inadequate and inequitable: (1) A manufacturer may not sell his goods but use them himself, and thus escape the business tax if it were imposed strictly on the basis of sales receipts; (2) A manufacturer might sell his article to a related company at a price lower than its true value, and thus again the sales receipts would not truly reflect the Washington business

activity; (3) If the goods so manufactured were sold for delivery outside the State of Washington, a tax measured by the local incident of *selling* is not permitted to the state of the seller under *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Freeman v. Hewit*, 329 U. S. 249, but a tax imposed upon the incident of manufacturing is permitted, although the goods are disposed of outside of the state, under *American Mfg. Co. v. St. Louis*, 250 U. S. 459. The Washington Legislature *might have* set up a manufacturing classification and so defined it that it included only those engaged in manufacturing who disposed of their goods by the three methods above-mentioned, and omitted those whose goods were sold at true value in Washington. Thus, the same result would have been reached; i. e., the single tax on manufacturers selling in Washington measured by the gross sales, but under the wholesaling classification. But instead, the manufacturing classification is broad and the wholesaling classification is broad, and the restriction as to those who both manufacture and sell the article in Washington is accomplished by § 6.

The State of Washington believes that those engaged in interstate commerce are as much obligated to pay their fair share of the obligations of government as are those engaged in purely intrastate activities. The State of Washington likewise acknowledges the fact that the imposition of taxes upon those so engaged in business having interstate attributes must be within the permissible confines of the Commerce Clause as interpreted by this Court. Petitioners, as will be seen by their position in the instant case, follow strictly the pattern set out by this court in *Allied Mills v. Department of Treasury*, 318 U. S. 740, and *International Harvester Co. v. Department*

of Treasury, 322 U. S. 340, on the one hand, and *Adams Mfg. Co. v. Storen*, 304 U. S. 307, and *Freeman v. Hewit*, 329 U. S. 249, on the other hand. Likewise the State follows the ruling of this Court in *American Mfg. Co. v. St. Louis*, 250 U. S. 459, permitting a tax on a local manufacturer measured by the gross proceeds of sales, though such sales be for delivery in interstate commerce to out-of-state buyers.

II.

THERE IS NO DISCRIMINATION

The tax is paid by all engaged in business in Washington, whether or not such business has interstate attributes, at the same rate and measure, but is apportioned as to receipts from interstate sales to reflect fairly the local business done.

Respondent is a wholesaler (R. 29, 30), strictly a sales company. Respondent is not a manufacturer (R. 30), has not manufactured any of the pine lumber with which we are here involved (R. 31), but purchased it in Oregon and Idaho, and sold it to purchasers in Washington. It was delivered from Oregon or Idaho in interstate commerce directly to the purchaser in Washington (R. 30).

Respondent is a Washington corporation (R. 27). Respondent's business activities in this state amount into the millions of dollars annually (R. 29, 30). It so happens that pine lumber was obtainable in Oregon and Idaho but not in Washington (R. 31). This does not prevent respondent from doing a thriving business in the State of Washington in this commodity (R. 30). Neither should it prevent the State of Washington from exacting a fair tax from respondent for the privilege of engaging in these local business activities. Its sales in this and other products are used as a measure of its business in the State. There should be no magic aura over the pine lumber sales which does not exist over the millions of dollars of fir lumber sales to buyers in Washington merely because one type of lumber is transported across a state boundary.

The tax is fairly apportioned to respondent's business activities in Washington. The gross receipts are used as the measure of this business. In addition to the pine lumber sales and the local sales of Washington lumber to

Washington buyers, there are large quantities of Washington lumber shipped out of the State to buyers in other states and foreign countries. Proceeds from this latter type of sale are not, and cannot be, included in the measure of respondent's business tax. *Adams Mfg. Co. v. Storen*, 304 U. S. 307; *Freeman v. Hewit*, 329 U. S. 249. Yet it is certainly a Washington business activity. By including in the measure of the tax the proceeds of the purely local sales and only so much of the interstate sales as are delivered to Washington buyers, and excluding the sales to buyers in other states, the tax is apportioned fairly to represent respondent's business activity in Washington. This procedure has been approved by this Court on numerous occasions as representing a fairly apportioned tax free of any possibility of a multiple burden on any one feature of the business, a tax procedure which does not place interstate business at a competitive disadvantage, and one which still permits the states to exact a fair tithe for the local privileges enjoyed. The local taxable event is the transfer of possession, the consummation of the sale, in Washington. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33; *International Harvester Co. v. Department of Treasury*, 322 U. S. 340; *Freeman v. Hewit*, 329 U. S. 249.

Where is there a discrimination? A person selling goods situated in Washington, but who is *not* the manufacturer, pays a tax at the rate of ¼ of 1% as measured by the gross proceeds of sales. § 4(e), Revenue Act. A person selling in Washington goods manufactured by him pays a tax at the rate of ¼ of 1% as measured by the gross proceeds of sales. §§ 4(b), 7, Revenue Act. A person selling goods which are shipped in interstate commerce to the buyer in Washington (as with respondent's pine

lumber sales) pays at a rate of ¼ of 1% as measured by the gross proceeds of sales. § 4(e), Revenue Act. All pay at the *same rate* on the *same measure*!

The tax is not aimed at interstate commerce. Wholly local transactions are treated in the same way. Any wholesaler, whether he ships in local or interstate commerce, pays the tax in exactly the same manner. Nor is the result like that of the "drummer" cases where a surface appearance of fairness discriminated against interstate commerce in application. The sales of local non-manufacturing wholesalers far, far exceed such interstate sales, so any "discrimination" would discriminate against a huge class of local business also. The Court is referred to the discussion at pages 19 and 20 of the supporting brief wherein the inequities of any change in the present procedure are set forth.

If respondent is engaged in business in Idaho and in Oregon, respondent should be, and undoubtedly is subjected to tax by those states; and, without doubt, the taxes so imposed are entirely proper and do not burden interstate commerce. Those States are not levying on respondent a tax for the local business activity of consummating wholesale sales measured by the gross receipts of these pine lumber sales, for this Court has prohibited such a tax (*Adams Mfg. Co. v. Storen, supra*; *Freeman v. Hewitt, supra*), and has permitted it by the state of the buyer where the sale is consummated by the transfer of possession (*Allied Mills v. Department of Treasury, supra*; *International Harvester Co. v. Department of Treasury, supra*).

Not being a *maufacturer* of the pine lumber sold, respondent itself cannot be subjected to a tax (as in *American Mfg. Co. v. St. Louis*, 250 U. S. 459) by the

States of Oregon or Idaho measured by the gross receipts from the sales of pine lumber to Washington buyers for the local activity of manufacturing. Thus, respondent is not even a person who could qualify as one falling under both the wholesaling and manufacturing categories of the Business and Occupation Tax! There is no multiple burden, or possibility thereof. Respondent, as a person, is not in a position to be hurt by the fact that a Washington manufacturer selling his product in Washington does not pay the business tax twice.

Respondent contends that it is hurt because Idaho or Oregon might have imposed a tax upon some *other* businessman in the State measured by the proceeds of the manufacturing activity. Respondent, then, is contending that the cost of his product is subject to a possible increase.

> "An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce." *Freeman v. Hewit*, 329 U. S. 249.

There is no such interference here. Respondent ignores the fact that the tax is on *persons* engaged in business. There will be as many subject to this tax as there are persons engaged in business. The tax is on the gross receipts or income of such businesses. Obviously, an article may go through one or many hands in the selling process, and will thereby be subjected to as many taxes as there are handlers thereof. Just as obviously, several handlers of an article will cause the cost to rise. Gross receipts taxes have long been approved. This vice, if it be such, is inherent in such a tax.

III.

THE BUSINESS AND OCCUPATION TAX IS AN EXCISE TAX

The tax is an excise, not an ad valorem tax, the measure "value of the products manufactured" being a term of art.

Respondent has repeatedly referred to the Business and Occupation Tax as an ad valorem tax as imposed upon those engaged in manufacturing activities. No reason is given for this reference nor does any reason exist. Apparently respondent has taken the term "value of the products manufactured," as used in § 4(b) and defined in § 7, and has twisted it to imply some sort of property taxation. His reasons for doing this are not very clear.

The measure chosen for the manufacturing classification, "value of the products manufactured" is a technical term of art given express meaning by definition in § 7, and that meaning is, for the most part, the gross proceeds of sales. This is the same measure, "gross proceeds of sales," as used for the wholesaling classification. See § 4(e), Revenue Act. This is the measure which would be used as to all sales subject to comparison with respondent's activities herein.

The use of this technical term of art does not alter what is in fact an excise tax. In this field, this Court has said, we deal "with matters of substance not with dialectics." *International Harvester Co. v. Department of Treasury*, 322 U. S. 340.

CONCLUSION

The Business and Occupation Tax is levied on all persons engaged in business measured by the gross receipts thereof. The fact that a person will perform several commercial functions with regard to the same product does not serve to cause multiple imposition of the tax, it being one which is levied only once on each receipt.

All persons selling goods to buyers in Washington, whether delivery is made in intrastate or interstate commerce, and whether they be the manufacturer of the goods or not, pay a tax on the identical measure at the identical rate.

The tax is apportioned to fairly measure respondent's activities in Washington. It does not aim at, discriminate against, nor impose a direct burden on Interstate Commerce. Purely local business is treated in the same manner.

The petition should be granted and the judgment below reversed.

Respectfully submitted,

SMITH TROY,
Attorney General of the State of Washington,

C. JOHN NEWLANDS,
Assistant Attorney General of the State of Washington,

Counsel for Petitioners.